IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7908 OF 2006

Vasant Haribhau Mutke & Ors. ..Petitioners.

V/s.

Shankar Gopinath Mutke ..Respondent.

Mr.Vaibhay P. Patankar for petitioner.

Mr.T.D. Deshmukh for the respondent.

CORAM : ABHAY S.OKA, J.

DATED : 11th APRIL, 2007.

P.C. :-

The submissions for advocates appearing for the parties were heard on the last date. The petitioners are the original plaintiffs. The petitioner applied for amendment of the plaint. By the order impugned dated 17th October, 2006 the said application has been rejected.

2. In the plaint, prayer made by the petitioner is in substance for injunction restraining the respondents from interfering with the use of the petitioner of the suit road more particularly described in the plaint. By the amendment, on the basis of the averments which are already made in the plaint, the petitioners desired to claim right of way by prescription instead of an easement of necessity. The

amendment has been rejected on the ground that the recording of evidence has been commenced. The learned trial Judge has upheld the contention of the respondent that the amendment will change the nature of suit.

3. After having perused the text of the proposed amendment, I am of the view that the proposed amendment will not change or alter the nature of the suit. It is true that evidence of witnesses has been recorded. If the amendment is allowed, the respondent can file additional written statement and both the parties can be permitted to recall the witnesses who are already examined for further examination-in- chief and / or further cross examination. The amendment will have to be allowed to avoid multiplicity of the proceedings.

4. Hence Writ Petition is disposed of by passing the following order.

i. The impugned Judgment and order dated 17th October, 2006 is quashed and set aside and the application made by the petitioner at Exhibit 198 in R.C.S.no.75/2000 is hereby allowed.

ii. The amendment to be carried out within a period of 2 weeks from the date of production of the

authenticated copy of this order before the trial Court.

iii. Additional written statement, if any, shall be filed by the respondent within a period of 4 weeks from the date of service of a copy of the amended plaint.

iv. The learned trial Judge is at liberty to recast the issues or to frame additional issues.

v. The parties will be free to apply for recall of the witnesses who are already examined for recording of further examination-in-chief and / or cross examination.

vi. Both the parties will be also entitled to lead additional evidence, if so advised.

vii. All contentions of the parties on merits are expressly kept open.

viii. Respondent will be entitled to withdraw the sum of Rs.3,000/- deposited by the petitioners in this Court by way of costs.

ix. Writ Petition is partly allowed in the above

terms.

(ABHAY S. OKA, J.)